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No. 96-238

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIRDES AND, AND PAUL A. JACOBS,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER RICHARD K. EHRLICH, AS TRUSTEE OF THE 1985 EHRLICH FAMILY TRUST AND AS TRUSTEE OF THE JULY 28, 1965 TRUST, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, AND THE BUILDING INDUSTRY ASSOCIATION OF NORTHERN CALIFORNIA

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The Building Industry Legal Defense Foundation has received the written consent of the parties to file this brief in support of petitioner, and has filed the letters of consent with the Clerk of this Court.

INTERESTS OF AMICI CURIAE

The Building Industry Legal Defense ("BILD") Foundation is a not-for-profit corporation organized under the laws of the State of California. The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California whose 1400 members include a significant number of residential developers and associate businesses that take part in building 70% of all new homes annually in the Southern California region.[1]

The California Building Industry Association ("CBIA") is a not-for profit corporation organized under the laws of the State of California. CBIA represents over 5,000 members who employ over 100,000 people. CBIA's members are involved in all aspects of the building and construction industry.

The Home Builders Association of Northern California ("HBANC") is comprised of more than 800 members who are involved in every aspect of residential, commercial and industrial building in the greater San Francisco Bay Area. HBANC members are responsible for building more than 80% of all new homes in the Bay Area.

The Building Industry Amici's interests lie in countering local governments' funding needs with the needs of the new home buyer for affordable shelter. Some communities in California are now demanding fees up to $77,000 per

[1] The BILD Foundation's mission is to "[d]efend the legal rights of home and property owners." The BILD Foundation promotes and supports important legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally.

house.[2] Heightened scrutiny applied to such fees would demonstrate to an apprehensive home buyer that the fee paid directly mitigated the impact from the new home. Additionally, a 10-20% miscalculation could result in significant savings. According to the National Association of Home Builders, even a $1,000 increase in the purchase price of a home can force 21,000 potential buyers out of the market. *The Truth About Regulations and the Cost of Housing* (NAHB, 1995) p.6.

SUMMARY OF ARGUMENT

Certiorari should be granted to clarify the well-established conflict in various state and federal courts regarding whether the standard articulated in *Dolan v. City of Tigard*, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (hereinafter "*Dolan*") applies to legislatively enacted monetary exactions and whether public agencies possess a compensable property interest in maintaining the perpetuation of land-use designations.

It is evident that monetary exactions or fees should be held to the same level of scrutiny as those involving dedications. For if monetary exactions receive less scrutiny, public agencies will simply impose a fee and then use the fee to purchase a possessory interest or construct a public improvement for which they would have otherwise been required to

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[2] For example, fees associated with the issuance of a building permit in the City of Solana Beach for a 2,000 square foot, 3 bedroom, 2 bath home valued at $169,000 can cost $77,721 [the following fee schedule is legislatively imposed and generally applicable: plan check — $797; building permit — $1,226; MPE permits — $216; seismic — $17; sewer — $4,500; water — $4,761; public facilities — $1,690; parks — $600; fire —$442; elementary school — $8,432 (this amount can run as high as $38,882 for "affordable housing"); high school —$10,590; inclusionary housing —$14,000] excluding fees for engineering, subdivision processing, annual sewer service charges, and *ad hoc* fees.

pay. The law does not permit public agencies to do indirectly what it does not permit them to do directly.

Additionally, there remains a heightened risk of extortion for legislative acts imposing a fee because no notice is required to be given to the fee payor of the requirement. Furthermore, legislative acts do not enjoy absolute deference. The Constitution applies equally to legislative as well as adjudicative acts.

Finally, the Fifth Amendment does not state "nor shall *public* property be taken for a *private* use without just compensation." By creating a public interest in private property, the California Supreme Court has turned the Fifth Amendment on its head.

ARGUMENT

A. CERTIORARI SHOULD BE GRANTED TO RESOLVE IMPORTANT ISSUES AS TO WHICH THERE IS A WELL-ESTABLISHED CONFLICT IN BOTH STATE AND FEDERAL COURTS

1. State And Federal Courts Are Split As To Whether *Dolan* Applies To Monetary Exactions In Addition To Those Involving Dedications.

There is a well-developed split on whether Dolan extends heightened scrutiny solely to permit conditions that require the dedication of real property and the concomitant loss of the right to exclude, or whether *Dolan* applies to monetary exactions as well.

Courts that have applied, or suggested the appropriateness of applying, a heightened scrutiny to development fees include state cases such as *Ehrlich v. City of Culver City*, 911 P.2d 429 (1996) (hereinafter "*Ehrlich*"); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d 1347 (Ariz. 1995);

Trimen Development Company v. King County, 877 P.2d 187 (Wash. 1994); *College Station v. Turtle Rock*, 680 S.W.2d 802 (Tex. 1984); *Collis v. Bloomington*, 246 N.W.2d 19 (1976); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966), and *Remmenga v. California Coastal Comm'n*, 163 Cal.App.3d 623, 628 (1985). At least two federal cases have suggested that *Dolan* is relevant in assessing impact fees. *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995) (relying in part on *Dolan* to strike down an affordable housing impact fee); *National Association of Home Builders v. Chesterfield County*, 907 F.Supp. 166, 168 (E.D. Va. 1995) *aff'd*, at 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996).

On the other side, some state courts have limited *Dolan*'s applicability to dedications, or suggested as much. *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995); *Blue Jeans Equities West v. City and County of San Francisco*, 221 Cal.App.3d 1072 (1992). So too have some federal courts. *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995); *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991); *Garneau v. City of Seattle*, 897 F.Supp. 1318 (W.D. Wash. 1995).

2. State And Federal Courts Are Split As To Whether Dolan Applies To Legislative Actions.

A number of state courts have seized on Justice Rehnquist's notation[3] that the exaction in *Dolan* was imposed on a building permit — issuance of which is an "adjudicative" act — to find that heightened scrutiny does not apply to exactions imposed on building permits pursuant to ordinances of general application. *See Ehrlich, supra*; *Loyola Marymount Univ. v. Los Angeles Unified School District*, 45 Cal.App.4th 1256 (1996); *Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d 1347 (Ariz. 1995);

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[3] *Dolan, supra*, 114 S.Ct. at 2316, fn. 8.

Southeast Cass Water Resource District v. Burlington Northern Railroad Co., 527 N.W.2d 884 (N.D. 1995); *Waters Landing Limited Partnership v. Montgomery County*, 650 A.2d 712 (Md. 1995); *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994); *Arcadia Development Corp. v. City of Bloomington*, 1996 Minn. App. LEXIS 930 (August 13, 1996). So too has at least one federal court. *Harris v. City of Wichita*, 862 F.Supp. 287 (D. Kan.1994).

Other state courts have held that exactions imposed pursuant to ordinances of general applicability are subject to *Dolan*'s heightened scrutiny. *Art Piculell Group v. Clackamas County*, 1996 Ore.App. LEXIS 1107 (July 31, 1996); *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360 (Or. 1994); *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. 1994); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *Trimen Development Company v. King County*, 877 P.2d 187 (Wash. 1994) [A county ordinance requiring developers seeking to build housing either dedicate land for public parks or pay a fee must meet *Dolan*'s "rough proportionality" test]. So too has at least one federal court. *National Association of Home Builders v. Chesterfield County*, 907 F.Supp. 166, 168 (E.D. Va. 1995) ("[I]n order for *any specific exaction implemented under a zoning ordinance* to pass constitutional muster . . " it must meet *Dolan*'s rough proportionality standard.) *aff'd*, at 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996). *Manocherian v. Lennox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied* 115 S.Ct. 1961, 115 S.Ct. 1962 (1995).

Two members of this Court are on record as supporting granting certiorari to address this issue. In dissenting from the denial of a writ of certiorari the Justices stated:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be

> relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distraction without a constitutional difference.

Parking Association of Georgia, Inc. v. City of Atlanta, Georgia 115 S. Ct. 2268 (1995)(Thomas, J. and O'Connor, J. dissenting).

3. State And Federal Courts Are Split As To Whether Local Government Should Be Compensated When Private Property Is Rezoned.

Ehrlich decided that a municipality may be entitled to some amount of compensation for the loss of certain zoning designations on private property. (*Ehrlich, supra*, 911 P.2d at 446.) Largely in accord are *Garneau v. City of Seattle*, 897 F.Supp. 1318 (W.D. Wash. 1995) (exaction imposed on condominium conversion to compensate city and displaced low-income residents); *Bullock v. City and County of San Francisco*, 221 Cal.App.3d 1072 (1990) (same); *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal.App.3d 892 (1986) (same).

Other courts have disagreed. *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995); *Golden Gate Hotel Association v. City and County of San Francisco*, 864 F. Supp. 917, (N.D. Cal. 1993) *rev'd on other grounds* in 76 F.3d 386.

B. DOLAN APPLIES TO MONETARY EXACTIONS

The Supreme Court's decision in *Dolan* itself strongly suggests that the rough proportionality standard is applicable to monetary exactions. Several of the cases relied upon by this Court in arriving at the rough proportionality standard in *Dolan* involved takings challenges to fees.[4] *E.g., Jordan v.*

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[4] Justice Stevens recognized this point in his dissent, noting that the cases cited by the majority "involve challenges to provisions . . . requiring developers to dedicate either a percentage of the entire

(footnote continues)

Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965); *Collis v. Bloomington*, 246 N.W.2d 19 (Minn. 1976); *College Station v. Turtle Rock*, 680 S.W. 2d 802, (1984); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966).

In addition, courts, like legislatures, do not engage in idle acts. This Court's decision to vacate and remand the Court of Appeal's original decision in *Ehrlich* was a clear signal that the principles set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan* apply to monetary exactions.[5] As the Arizona Court of Appeals stated in *Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d 1347, 1352 (1995), "we agree that the *Ehrlich* remand implies that a monetary fee is subject both to a takings analysis, and . . . to a *Dolan* analysis."

Common sense supports this position. As an initial matter, it is difficult to conceive of a justification for subjecting impact fees to a lesser degree of scrutiny than dedication requirements. Monetary exactions are the functional equivalent of dedications. Treating fees and dedications differently would create a giant loophole in the *Nollan/Dolan* doctrine. If fees were subject to a lesser degree of scrutiny, government would have the incentive and ability to demand mitigation through fees exclusively. Nothing would prevent government from exacting a fee, exercising its power of eminent domain, and using the fee revenue to pay for the acquisition or improvement. From the property owner's perspective, he or she is left in the same position as would have been the case had the original exaction been a dedication requirement.

(footnote continued)

parcel . . . or an equivalent value in cash . . . to help finance the construction of roads, utilities, schools, parks, and playgrounds." *Dolan* at 129 L.Ed.2d 326 (Stevens, J., dissenting).

[5] "Whenever this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision in the light of an intervening decision of this Court, the Court is acting on the merits." *Board Of Trustees Of Keene State College et al. v. Sweeney* 439 U.S. 24, 25-26 (1978).

Post-*Dolan* cases recognize this proposition and are in accord with it. In *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), the U.S. Court of Appeals for the First Circuit suggested that *Dolan*'s rough proportionality standard applies to impact fees that were imposed on a development project by the City of Portsmouth, New Hampshire. In *Trimen Development Company v. King County*, 877 P.2d 187, 192 (1994), the Washington Supreme Court applied Dolan's heightened scrutiny to a park impact fee, holding that to be valid, an impact fee must be "required to mitigate the direct impact of the development." And in *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (1995), the Illinois Supreme Court subjected a transportation impact fee to *Dolan*'s heightened scrutiny.

Pre-*Dolan* California cases have also suggested that dedications and fees should be evaluated similarly for takings purposes. In *Remmenga v. California Coastal Comm'n.*, 163 Cal.App.3d 623, 628 (1985), the Court of Appeal recognized the functional equivalence of fees and dedications:

> Viewing the problem as a whole, it appears that the requirement to pay an in lieu fee of $5,000 for development of one lot presents essentially the same constitutional issue as would be presented by a requirement that the owner of unimproved property adjoining tidelands dedicate public right-of-way in order to obtain a development permit.

See also, Associated Homebuilders of the Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (1971) (applying the same takings analysis to a park land dedication requirement and a park impact fee); *Grupe v. California Coastal Comm'n.*, 166 Cal.App.3d 148, 163 (1985) (discussing the proper standard for testing the validity of "all exactions").

In light of the foregoing discussion, Amici submit that *Blue Jeans Equities West v. City and County of San Francisco*, 221 Cal.App 3d 1072 (1992), and *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), were overruled by *Dolan*, contrary to the statement in *Ehrlich, supra*, 911 P.2d at 443. *Blue Jeans Equities*, in particular, relied on reasoning that was expressly rejected in *Dolan*. The Court of Appeal in *Blue Jeans* stated that the "High Court appears to make a distinction between regulatory takings, i.e., economic regulation, and possessory takings." *Blue Jeans Equities* at 169. However, while this position was advanced by Justice Stevens in *Dolan* ("The exactions associated with the development . . . are likewise a species of business regulation that heretofore warranted a strong presumption of constitutional validity." *Dolan, supra*, 129 L.Ed.2d at 327), it was dismissed by the majority.

C. DOLAN APPLIES TO LEGISLATIVE ACTIONS

1. The Limitations Of The Fifth Amendment Apply To Fees Adopted By A Legislative Action As Well As An Adjudicative Action.

The conditions in *Dolan*, like the City's public art fee, were imposed under the authority of an ordinance of general application. The City of Tigard's Comprehensive Development Code required all property owners in the Central Business District to comply with certain dedication requirements for pedestrian/bicycle pathways and greenway/drainage space. *Dolan, supra*, 129 L. Ed. 2d at 311-313. As Justice Souter recognized:

> The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions . . . , but the permit conditions were imposed pursuant to Tigard's Community Development Plan. *Dolan supra*, 129 L. Ed. 2d at 334 (Souter, J., dissenting).

Thus, the nature of the exaction involved in *Dolan* and in this case are identical on this point: each was imposed on a specific project pursuant to an essentially legislative determination applicable to all development projects.

Nollan, supra, 483 U.S. at 829 makes clear that the exaction imposed was made pursuant to a legislative act, the California Coastal Act of 1976:

> The Superior Court . . . finding, in part to avoid issues of constitutionality, "that the California Coastal Act of 1976, Cal. Pub. Res. Code Ann. @ 30000 et seq. (West 1986), authorized the Commission to impose public access conditions on coastal development permits for the replacement of an existing single-family home with a new one only where the proposed development would have an adverse impact on public access to the sea.

Unfortunately, lower courts and public agencies have misread the *Dolan* and the *Nollan* decision by seizing upon the "adjudicative decision" language used by the majority in *Dolan, supra*, 114 S.Ct. at 2316, fn. 8, as limiting the application of *Dolan* and *Nollan*.

Subsequent to its decision in Dolan, the Supreme Court has confirmed that *Dolan* applies to legislative acts. In *Altimus v. Oregon*, 115 S. Ct. 44, (1994), this Court vacated and remanded the case to the Court of Appeals of Oregon "for further consideration in light of *Dolan v. City of Tigard*." *Altimus* involved a takings challenge to an exaction imposed as a condition to a project requesting a zoning change—a legislative act. (See footnote 5, *supra*.)

Post-*Dolan* cases have recognized that heightened scrutiny is appropriate where an exaction is being applied to a particular project, notwithstanding whether the government approval being sought is nominally "legislative" or "adjudicative." In *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d

360 (Or. 1994), the Court applied Dolan's rough proportionality standard to exactions imposed pursuant to a county-wide zoning ordinance:

> [T]he county relies on the fact that some of the improvements are required by its zoning ordinance. As we said in *Schultz v. Grants Pass* . . . however, "the character of the [condition] remains the type that is subject to the analysis in *Dolan*' . . . , whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters. Our conclusion is not at odds with the Supreme Court's differentiation between adjudicative conditions and particular properties and generally-applicable legislative regulations. . . . A condition on the development of particular property is not converted into something other than that by reason of legislation that requires it to be imposed. *Id.* at 365, n.1 (citation omitted).

See also, Schultz v. City of Grants Pass, 884 P.2d 569 (Or. 1994) (*Dolan*'s heightened scrutiny standard applicable to city's exaction, notwithstanding the fact that the exaction was imposed pursuant to city-wide ordinance of general application).

At least one Pre-*Dolan* California decision is in accord. See *Scrutton v. County of Sacramento*, 275 Cal.App. 412 (1969) (applying *Dolan*-like scrutiny to exaction imposed on a rezone application).

2. Concern For A Heightened Risk Of Extortion Requires Dolan's Application to Legislatively Adopted Fees.

The California Supreme Court attempted to distinguish legislative actions of public agencies which adopt generally

applicable fees affecting a broad class of property owners from adjudicative fees:

> Fees of this nature may indeed be subject to a lesser standard [the fee must substantially advance a legitimate state purpose — *Agins v. City of Tiburon* 447 U.S. 255, 260 (1981)] of judicial scrutiny than that formulated by the court in *Nollan* and *Dolan* because the heightened risk of the "extortionate" use of the police power to exact unconstitutional conditions is not present.

(*Ehrlich, supra*, 911 P.2d 429, 444).

The basis for this distinction was this Court's concern, iterated in *Nollan*, that a local agency's exaction may amount to out-and-out . . . extortion. *Ehrlich, supra*, 911 P.2d at 459 citing *Nollan, supra*, 483 U.S. at p. 837. A concern for preventing extortion was the principle for this distinction. The California Supreme Court did not believe that there was a heightened risk of extortion for legislatively adopted fees due to the fact that the legislative process permits the interests of all people to be considered. A legislative action is a "case[] in which the courts have deferred to legislative and political processes to formulate "public program[s] adjusting the benefits and burdens of economic life to promote the common good.' "[6]

If one were to apply the Court's principle regarding extortion, legislative actions should not be treated differently. The heightened risk of extortion, exists no less for legislatively adopted fees. The new home buyer has the least political clout to remedy extortionate fees because he or she usually resides outside of the public agency's jurisdiction at the time of the fee's adoption.

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[6] Ehrlich, supra, 911 P.2d 429, 447.

The new home buyer is not required to receive notice of a legislatively adopted fee and therefore is not able to become involved in the "political process."

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard."
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> *Bi-Metallic Co. v. Colorado* 239 U.S. 441, 445 (1915).
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> [O]nly those governmental decisions which are adjudicative in nature are subject to procedural due process principles. Legislative action is not burdened by such requirements.
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> *Horn v. County of Ventura*, 596 P.2d 1134, 1137 (1979); *see also, Mullane v. Central Hanover Trust Co.* 339 U.S. 306, 313 (1950).

Elected officials and current residents, aware of this fact, often argue in favor of the adoption of fees which pay for public facilities not entirely, or not in the least, caused by new development. Elected officials realize that since the ultimate fee payor is not currently a constituent and has not received notice, he or she is unlikely to express his or her displeasure with the fee by voting the decision maker out of office.[7] In addition, the current residents, looking out for

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[7] *See, e.g., California Building Industry Association v. Governing Board of Newhall School District*, 206 Cal.App.3d 212, 218 (1988) (" . . . the exactions were imposed not on an electorate which, unsurprisingly, voted overwhelmingly to approve them, but rather

(footnote continues)

their own interests, generally believe that it is better for new residents, rather than themselves, to pay for such facilities. As a result, the risk of extortion for generally applicable fees is just as high, if not higher than it is for those which are individually imposed.

A legislatively adopted fee may be adopted years prior to its actual imposition and on an entire city or county. Fees imposed on adjudicatory land use approvals occur closer in time to the purchase of a new home and on a geographically specific project and are therefore more likely to provide notice to the new home buyer. It seems ironic that the new home buyer should be provided greater protection from extortionate fees where he or she is more likely to receive notice than otherwise.

3. Deference To Legislative Acts Does Not Require Ignoring The Takings Clause

In part, the distinction made by the California Supreme Court is based on the greater deference paid to a public agency's legislative, as opposed to adjudicative, actions based on the separation of powers doctrine. Yet, nowhere does this greater deference require judicial review of such a fee to ignore the Constitution.

In a recent decision, *U.S. v. Winstar Corp*, 1996 U.S. LEXIS 4266 (July 1, 1996) (hereinafter "*Winstar*"), this Court stated that complete deference to a legislative assessment is not appropriate when the state's self-interest is at

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(footnote continued)

solely on the developers of new residential projects."); *Stubblefield Construction Co. v. City of San Bernardino*, 32 Cal.App.4th 687, 711 (1995) *cert. denied* 116 S.Ct. 300 ("It is not uncommon or unusual for a legislator to oppose a project and to use all means within his or her power to defeat it. After all, a legislator is supposed to respond to the concerns of his or her *constituents* . . . Whether their concerns were proper or justified is not the issue here. The point is that their elected representative decided to oppose the project, and did so vigorously." Emphasis added.).

stake. *Id.* at *100, fn. 41. The Court further noted that a stricter level of scrutiny applies in such cases. *Id.* The Court characterized self-interest as an:

> [I]nstance in which the government seeks to shift the costs of meeting its legitimate public responsibilities to private parties. [Citation omitted.] The government may not 'force some people alone to bear public burdens which . . . should be borne by the public as a whole.'[8] *Id.*

The Court's clarification was in response to the government's claim that the Sovereign Acts Doctrine applied and therefore absolute deference must be accorded to the Legislature's public and generally applicable act.[9]

Although *Winstar* applied the prohibitions of a different provision of the U.S. Constitution, i.e., the Contract Clause, this Court found that the deference generally granted to legislative determinations is not applicable where the interpretation or application of a Constitutional provision is at issue. As this Court has stated, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Nixon v. United States*, 506 U.S. 224, 238 (1993).

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[8] The Court also cited *Dolan* for this proposition noting that all regulations have their costs. *Winstar, supra*, at *76-77. As this Court noted, *supra*, the exactions in *Dolan* were based on legislative enactments.

[9] The government in *Winstar* argued that a standard almost identical to the *Agins* test should be applied to the public and general act of the legislature, i.e., whether the act "advance[s] the general welfare." *Winstar Corp., supra*, at *93-94. The *Ehrlich* Court suggested that the test for legislative actions should be whether they substantially advance a legitimate governmental purpose. As this Court rejected the test proffered by the government in *Winstar*, so should it reverse the California Court's deferential standard applied to legislatively enacted, generally applicable fees.

In applying minimum scrutiny to fees imposed on a broad class of people, the California Supreme Court essentially said that "the frequent and widespread nature of unconstitutional acts will transform them into constitutional acts." This bizarre conclusion was commented upon by Justices Thomas and O'Connor, *supra*, in *Parking Association of Georgia, Inc. v. City of Atlanta*, Georgia 115 S. Ct. 2268 (1995).

D. LOCAL GOVERNMENT SHOULD NOT BE COMPENSATED FOR THE LOSS OF A PRIVATE RECREATIONAL FACILITY

Much of the briefing at the California Supreme Court in this case focused attention on the fact that the fee was requested to mitigate an impact to the *public* based on the loss of a *private* recreational facility. The California Supreme Court stated, without citing any authority, "[t]his principle — that the discontinuation of a private land use may have distinctly *public* consequences — is well accepted in land use law."[10] The California Supreme Court's opinion regarding impacts to the public appears to have turned the Fifth Amendment on its head. In essence, the Fifth Amendment has been rewritten by the *Ehrlich* Court to state, "nor shall public property be taken for a private use without just compensation" where the public property taken is now a vested right to the maintenance of the current zoning in perpetuity. The Court said, "[t]he *opportunity* of Culver City residents to use such private recreational facilities created a public benefit by enlarging the *availability* of such facilities."[11] Therefore, public agencies might have a compensable (vested) right to *opportunities* presented by zoning designations. Similarly, public agencies would have a right to the continuing operation of a facility once it is built since that is what "*availability*" connotes.

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[10] *Ehrlich, supra*, 911 P.2d 429, 446.

[11] *Ehrlich, supra*, 911 P.2d 429, 447.

What the California Supreme Court did in the passage just cited was to impose on property owners the responsibility for continuing to provide zoned uses or pay to make a change to the zoning designation. It seems that the California Court has now accomplished indirectly what could not be accomplished directly, i.e., the property owner must now pay compensation. This is contrary to the Fifth Amendment as well as this Court's precedent, "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922).

With the *Ehrlich* decision, a new property right has been judicially created and an existing property right has been diminished. Two members of this Court are on record as supporting review on the issue of a state's redefinition of traditional property rights to avoid compensation:

> As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, [Cit. Omit.] neither may it do so by invoking non-existent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a State court chooses to denominate "background law" — regardless of whether it is really such — could eliminate property rights. "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." [Cit. Omit.] No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.

Stevens v. City Of Cannon Beach 114 S. Ct. 1332 (1994) (Scalia, J., and O'Connor, J., dissenting).

Historically, private property owners have not had a vested right to existing zoning because "the rights preserved to the individual . . . are held in subordination to the rights of society." *Viso v. State of California* 92 Cal.App.3d 15, 20 (1979). That is to say that the common good trumps private goods which nobody will deny. "The most fundamental principle of government — that it exists primarily to provide for the common good." *Cotton Petroleum Corp. v. New Mexico* 490 U.S. 163, 190 (1989) . Thus all laws should be directed towards the common good. Yet while the common good is the goal of law, this important end does not justify any means. Indeed, the Constitution places limits on the means to be chosen.

> [T]here are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the *common good*, that is, to leave his property economically idle, he has suffered a taking.

Emphasis added. *Lucas v. South Carolina Coastal Council* 505 U.S. 1003, 1019 (1992); *Goldblatt v. Hempstead* 369 U.S. 590, 594-595 (1962). Thus, while the common good grants the power to regulate land use, the Fifth Amendment provides that just compensation is a limit on the means by which it can be accomplished.

The decision of the California Supreme Court in *Ehrlich* has done nothing less than establish a public interest in zoning which triggers compensation to a local government upon rezoning. Regardless of the motivation for doing so, the Fifth Amendment necessarily limits the means which can be used to control the use of land.

CONCLUSION

Therefore, for the reasons stated above and in the Brief for Petitioners, the Building Industry *Amici* pray that this Court grant certiorari and affirm in part the California Supreme Court's opinion applying *Dolan* to monetary exactions and reverse in part by applying *Dolan* to legislative actions and prohibiting a public vested right in the use of private property.

Respectfully submitted,

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